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IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 674

TWENTIETH CENTURY-FOX FILM CORPORATION, ET AL.,

Petitioners,

against

BROOKSIDE THEATRE CORPORATION,

Respondent.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The basic premise of respondent's brief in opposition to the petition for certiorari is that petitioners have advanced no reason why this Court should review the decision below. Petitioners have fully set forth in their petition the reasons for the allowance of the writ and have shown that important questions of federal law are involved which should be decided by this Court.

First: The trial court permitted respondent to use the proceedings in *United States* v. *Paramount* in a manner which violated the rule of the *Emich* case. Numerous anti-trust cases are pending which allege that they are based in part on prior government proceedings. Unless this Court corrects the errors in the use of prior government proceedings which were sanctioned in this case, the limited use of prior judgments and

decrees permitted by Section 5 of the Clayton Act as construed by this Court in the *Emich* case will be circumvented.

The errors committed by the trial court with reference to the proceedings in *United States* v. *Paramount* are set forth in the petition (pp. 4-5; 12-14) and record references to these errors are fully set forth in the statement of facts (Petition, pp. 4-5). Petitioners' basic position, as stated in the petition, is that the use made of the proceedings in *United States* v. *Paramount* on the trial of this action was improper in the light of the *Emich* case.

The *Emich* case holds that a criminal judgment may be introduced to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based. The trial judge is given discretion as to what matters he will take into consideration in determining the issues necessarily decided by the prior judgment and verdict. That case states that where the prior judgment was rendered in a criminal case the trial judge may, in his discretion, approve the attachment of a copy of the indictment as an exhibit to the complaint. But even though the *Emich* case permits the trial judge to exercise his discretion as to the manner in which he instructs the jury as to the issues decided in the prior action and the scope of the estoppel, this Court clearly summarizes the manner in which a prior judgment should be handled. The Court states that it is the duty of the trial judge to:

> ". . . (1) examine the record of the antecedent case to determine the issues decided by the judgment; (2) in his instructions to the jury reconstruct that case in the manner and to the extent he deems necessary to acquaint the jury fully with the issues determined therein; and (3) explain the scope and effect of the former judgment on the case at trial." (340 U. S. 558, 572)

The *Emich* case does not sanction plaintiff's counsel's giving his version of the charges or holdings in the prior government case even though the version given by plaintiff's counsel may be factually correct.* Nor does the *Emich* case permit plaintiff's counsel to read findings of fact and conclusions of law entered in the prior proceeding.

The trial judge did instruct the jury that certain findings in *United States* v. *Paramount* could be considered in their determination (R. 2607-2609). But, the jury still had before it the findings read to it by plaintiff's counsel, many of which were different from those summarized by the trial court. The total effect of this handling of the *United States* v. *Paramount* was to leave to the jury the scope of the ultimate estoppel.

SECOND: The rule of damages applied by the trial judge was that plaintiff was entitled to recover the damage which it sustained as of the date of the sale of its theatre. In support

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*At page 15 of respondent's brief the following statement is made:

> "Petitioners assert that respondent's counsel was permitted 'to present to the jury his interpretation' of the Paramount case and permitted 'to give his version' of that case (p. 13, Petition). *This assertion is out of the whole cloth. Petitioners cite this court to no place in the record where any such thing occurred. The record will not sustain the charge made.*"

We respectfully direct this Court's attention to the Record, pp. 171-176 (cited at page 4 of the petition). In his opening statement respondent's counsel, contrary to the present assertion, did give his interpretation and version of the prior government proceedings. In fact, petitioners objected when respondent began to discuss *United States* v. *Paramount* in its opening argument and the trial court in overruling the objection said:

> "The Court: I don't think it ought to be argued. I think they have a right to bring into this case the matters that are involved here and the matters alleged in this complaint, and the objection will be overruled. *But limit them as nearly as you can, Mr. Boatright, please, to the matters that are at issue in this case. You know what they are pretty well.*" (R. 171) [Emphasis supplied]

of this measure of damages the trial court permitted plaintiff to submit to the jury the profits made during the operation of the theatre by the company which purchased it from the plaintiff (R. 722-727, P. Ex. 113). The trial court instructed the jury that these profits could be considered as one of the elements in determining the amount of damages plaintiff sustained on the date of the sale (R. 2620-2621). Petitioners contended that the correct measure of damages was the difference between the market value of the theatre on the date of the sale and what plaintiff actually received for the sale of its theatre.

In *Milwaukee Towne Corp.* v. *Loews, Inc.*, 190 F. 2d 561 (7th Cir., 1951) *cert. den.* January 7, 1952, an anti-trust action involving some of these petitioners, defendants introduced evidence of the actual profits made by plaintiff's theatre during its operation as a first run theatre. The Court of Appeals and trial court disregarded this evidence based on actual operation. In the petition for certiorari filed in the *Milwaukee Towne* case, defendants sought review on the ground, among others, that the decisions of the trial court and the Court of Appeals in that case conflicted with *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U. S. 689 (cited at page 22 of respondent's brief). This Court denied certiorari.

The number of pending anti-trust actions makes it imperative that this Court clarify the rule of damages which should be applied and the evidence which may be received. Petitioners do not seek to escape liability where such liability is proven, but recovery under the Clayton Act must be in accordance with accepted principles of the measure of damages.

THIRD: The courts below held that the 1940 consent decree entered into by five of the petitioners was not a final

decree which terminated the litigation. Numerous private anti-trust actions are pending in which this precise question is involved and it is important that, in connection with these actions now pending in various District Courts, the question of the finality of the 1940 consent decree be resolved. This Court has not previously passed upon the question as to whether an action is terminated by a consent decree when the government at a later date seeks to modify that decree.

Petitioners urge that a decree entered upon consent is a final decree even though the government might at a later date, under the terms of the decree, move to modify. The provisions of the consent decree on which respondent relied in the lower courts to deprive that decree of its finality were included to meet special economic conditions in the industry. The Court of Appeals reached the conclusion that because the 1940 consent decree did not dispose of the litigation, therefore, it was not a final decree. This conclusion completely ignores the fact that in the period from the entry of the decree until the government filed its motion to modify, there was no proceeding pending against these five defendants. Petitioners conceded on the trial of the action that after the motion to modify was made proceedings were pending against these five defendants until terminated by new decrees.*

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*In considering the decree to be entered in 1946, the court stated (66 F. Supp. 323, 339):

"It shall make such disposition of the provisions of the existing consent decree signed November 30, 1940, as may be necessary in view of the foregoing opinion."

The Decree entered by the Expediting Court on December 31, 1946, did set aside the 1940 Consent Decree, which had then been in effect for over 6 years, for it contained the following provision:

"V. The provisions of the existing consent decree are hereby declared to be of no further force or effect, except in so far as may be necessary to conclude arbitration proceedings

Respondent relies upon a statement found in the opinion of the Expediting Court (Rsp. Br. pp. 25, 26). The question before the Expediting Court was not whether the *Paramount* case had been pending from 1940 until 1944, but whether the government, under the 1940 decree, had the right to apply for a modification of that decree. The court merely stated that the decree could be modified because it contained an express provision permitting any of the parties to apply for modification within three years after entry of the decree.

If the government had never moved to modify the 1940 consent decree it would not and could not be argued that the entry of that decree did not terminate the litigation against the consenting petitioners. The finality of a decree is not affected by future events and the fact that subsequent to the entry of the decree the government saw fit to modify does not make the 1940 consent decree any less final.

Fourth: Although neither court below passed upon the applicability of the Wartime Suspension Act, the question as to whether that Act is, in fact, applicable to private anti-trust actions is vitally important and should be decided by this Court. The question will be reached in this case if this Court decides that the 1940 consent decree was a final decree which began the running of the statute of limitations.

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now pending and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, incurred in the establishment of the consent decree arbitration systems. Existing awards and those made pursuant to pending proceedings shall continue to be enforceable. But this shall in no way preclude the parties or any other persons from setting up a reasonable system of arbitration either through the use of the present boards or any others as among themselves."

The provision above is clear proof that the court recognized that its new decree was a modification of the 1940 consent decree.

For the reasons stated above and for the reasons advanced in petitioners' petition for certiorari, it is respectfully requested that this Court grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the important questions of federal law presented by this petition.

Respectfully submitted,

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April 30, 1952.